

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AMELIA A. ALLEN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION EXTENDED CARE CENTER, St. Albans, N.Y.

*Docket No. 98-231; Submitted on the Record;
Issued June 29, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof in establishing that she had a recurrence of disability after November 22, 1994 causally related to her December 28, 1992 employment injury.

On December 28, 1992 appellant, then a 57-year-old registered nurse, was attempting to transfer a patient to a wheelchair when she developed back pain. She stopped work on December 29 and returned to work on December 31, 1992. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain. Appellant stopped working on March 14, 1993 and filed a claim for recurrence of disability. She returned to light-duty work on February 1, 1994. In an April 25, 1994 decision, the Office rejected appellant's claim for a recurrence of disability. Appellant returned to full duty on June 24, 1994. In an August 5, 1994 decision, an Office hearing representative set aside the Office's April 25, 1994 decision.¹ The Office subsequently paid appellant compensation for the period April 17, 1993 through January 31, 1994. On August 2, 1994 appellant again stopped work and filed a claim for recurrence of disability. In an October 18, 1994 decision, the Office denied appellant's claim for a recurrence of disability. On November 7, 1994 appellant returned to light duty. On November 22, 1994 appellant again stopped work and filed a claim for recurrence of disability. She stated that she was dispensing medication from a cart when she felt muscle spasms in the lower back. She indicated that since she had returned to work she had chronic lower back pain with unexpected muscle spasms of the back, right hip and leg. In a January 19, 1995 decision, the Office denied appellant's request for a hearing of the October 18, 1994 decision, on the grounds that the request was untimely and the issue in appellant's case could be addressed through a request for reconsideration. In a March 15, 1995 decision, the Office denied appellant's claim for a recurrence of disability beginning November 22, 1994. Appellant

¹ The case record submitted on appeal does not contain many items, including the April 25, 1994 Office decision and the August 5, 1994 decision, by the Office hearing representative. However, as these decisions and the other missing items are not at issue on this appeal, the absence of these documents will not affect this appeal.

requested a hearing before an Office hearing representative, which was conducted on August 31, 1995. In an October 20, 1995 decision, the Office hearing representative found that appellant had not met her burden of proof in establishing that her November 22, 1994 recurrence of disability was causally related to her December 28, 1992 employment injury. He, therefore, affirmed the Office's March 16, 1995 decision. Appellant requested reconsideration. In an April 5, 1996 decision, the Office denied appellant's request for reconsideration because she had not submitted any new and relevant evidence or new legal arguments in support of her request. Appellant again requested reconsideration. In a January 6, 1997 merit decision, the Office denied appellant's request for modification of the Office's prior decisions.² Appellant once again requested reconsideration. In a July 25, 1997 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and, therefore, insufficient to warrant review of the prior decision.

The Board finds that appellant has not met her burden of proof in establishing that she had a recurrence of disability beginning November 22, 1994 that was causally related to her December 28, 1992 employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.³

In a November 30, 1994 form report Dr. Uriel T. Davis, an osteopathic neurologist, diagnosed lumbosacral strain and sprain and lumbar radiculopathy. In a January 10, 1995 report Dr. Milton M. Smith, a Board-certified orthopedic surgeon, noted appellant complained of low back pain radiating to the right leg. He diagnosed chronic low back pain. These reports do not discuss whether appellant's condition or disability commencing November 22, 1994 was causally related to the December 28, 1992 employment injury. These reports, therefore, did not assist appellant in meeting her burden of proof. In an October 8, 1996 report Dr. Davis noted that a magnetic resonance imaging (MRI) scan and an electromyogram (EMG) of appellant were negative. He related that appellant continued to have intermittent severe, immobilizing spasms of the low back, sometimes associated with buckling of the right knee and constant radicular pain down the posterior aspect of the right leg to the first toe. He indicated that standing and walking any distance exacerbated appellant's symptoms. He stated that on examination

² The Board notes that an senior Office claims examiner stated in a memorandum supporting the January 6, 1997 decision, that the November 22, 1994 injury occurred in the course of willful misconduct, because appellant had exceeded her work restrictions when she sustained a recurrence of disability. The Board has held that willful misconduct in an affirmative defense on which the Office must make a finding in the original adjudication of the case. *Paul Raymond Kuyoth*, 27 ECAB 498 (1976). The senior claims examiner, therefore, erred in raising the issue of willful misconduct in a reconsideration of the original adjudication in this case. The Board will not address at this time whether exceeding work limitations constitutes willful misconduct.

³ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

appellant had exquisite tenderness to palpation of the lumbosacral musculature on the right and limited straight leg raising bilaterally. He diagnosed trauma-induced lumbar radiculopathy and lumbosacral strain that appellant's recurrences of disability on August 2 and November 22, 1994 were causally related to December 28, 1992 employment injury. He stated that appellant's condition on November 22, 1994 as compared to her condition prior to that date, represented a clear change in the nature and extent of her injury and disability causally related to the original work-related injuries. Dr. Davis, however, gave no rationale in support of his opinion. He did not explain how appellant's back condition would have persisted for almost two years even though the MRI scan and the EMG were negative. He did not describe how the effects of the December 28, 1992 employment injury would have led to appellant's disability after November 22, 1994. Dr. Davis' report, therefore, is of diminished probative value and is insufficient to establish that appellant had a recurrence of disability due to the December 28, 1992 employment injury.

The decisions of the Office of Workers' Compensation Programs, dated July 25 and January 6, 1997, are hereby affirmed.

Dated, Washington, D.C.
June 29, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member